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IN THE

Supreme Court of the United States

UNITEDHEALTH GROUP, INC., f.k.a. United HealthCare Corporation, *et al.*,
Petitioners,

v.

LEONARD J. KLAY, M.D., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The Court should grant the petition to resolve the courts of appeals' conflicting interpretations of §3's mandatory stay provision that stem from the First, Second, Fourth, and Eleventh Circuits' misreading of *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983), and *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213 (1985). In the circuits that have adopted that misreading, the congressionally mandated stay is easily avoided by gamesmanship in artful pleading, forcing parties with clearly established arbitration rights to litigate arbitrable issues in derogation of the FAA's strong policy favoring enforcement of arbitration agreements.

ARGUMENT

Respondents' brief in opposition illustrates why faithful enforcement of §3's mandatory stay is critical in protecting parties' arbitration rights. Respondents are openly contemptuous of the arbitral process, describing petitioners' exercise of their hard-fought arbitration rights as a "side show" in which respondents simply refuse to participate. Br. Opp'n 5 n.5. Under the Eleventh Circuit's nontextual, discretionary interpretation of §3, now embraced by a growing faction of circuits, a finding of arbitrable issues means little if the party opposing arbitration can assert a "nonarbitrable" claim that involves the same arbitrable issues. The Eleventh Circuit's discretionary reading of §3 enables respondents to litigate, under the guise of "nonarbitrable claims," the same issues that the district court (and this Court) have already held that petitioners are entitled to arbitrate.

This approach conflicts with the plain language of §3, which mandates that courts "shall" stay litigation when an "*issue* involved in such suit or proceeding is referable to arbitration," 9 U.S.C. §3 (emphasis added), not just when the litigation involves arbitrable *claims*. Respondents concede that §3 applies to arbitrable "disputes," Br. Opp'n 9 (quoting *Moses H. Cone*, 460 U.S., at 22), but mistakenly suggest that a dispute exists only if respondents directly plead an arbitrable claim. This reading of §3, reflected in the Eleventh Circuit's decision and other courts' discretionary stay holdings, ignores that a dispute exists as long as two parties disagree—and, here, the MCCs and respondents disagree about the MCCs' payment decisions.[1]

---

[1] Indeed, the MCCs are entitled to arbitrate these ongoing disagreements with respondents whether or not any of the claims in this litigation proceed. Respondents cannot unilaterally render live disputes nonarbitrable by purporting to abandon select claims or by recasting core arbitrable issues as elements of "nonarbitrable" claims.

It is undisputed that respondents allege and intend to prove improper payment decisions as an element of their "nonarbitrable" conspiracy and aiding-and-abetting claims. The district court openly acknowledged this litigation strategy but still refused to issue a §3 stay to protect the MCCs' arbitration rights. *In re Managed Care Litig.*, 298 F.Supp.2d 1259, 1285-88 & n.12 (S.D. Fla. 2003). And, under the Eleventh Circuit's discretionary-stay holding, the decision to proceed with litigation is a judgment call for the district court.

The impending harm caused by the Eleventh Circuit's improper reading of §3 is serious and imminent. If the trial is permitted to go forward as planned later this year, petitioners will be forced to litigate every core arbitrable issue that exists in this case, all in violation of their rights under the FAA. Unless the trial is stayed, as §3 mandatorily requires, literally millions of arbitration agreements at issue in this class action will be eviscerated and this litigation will judicially resolve direct payment disputes that respondents do not contest fall within the scope of the parties' arbitration agreements. Indeed, because it is undisputed that the litigation involves arbitrable issues, if not arbitrable "claims," this case is particularly well suited to resolve the conflict over the proper scope of §3.

The Eleventh Circuit's discretionary reading of §3 thwarts Congress's goals in enacting the FAA and is neither sanctioned nor even remotely supported by the statutory text or the Court's precedent. A clear divide exists between the First, Second, Fourth, and Eleventh Circuits—which read *Moses H. Cone* and *Byrd* to authorize a court to deny a §3 stay when litigation contains both arbitrable and nonarbitrable claims—and the Third, Fifth, and Seventh Circuits, which have recognized that the FAA requires courts to grant an arbitrating party's request for a §3 stay of an action that involves arbitrable issues. The Court should clarify whether *Moses H. Cone* and *Byrd* invest district courts with discretion under these circumstances or

whether, consistent with its text, the FAA mandates that courts respect parties' agreements to arbitrate by staying litigation of arbitrable disputes, however pleaded.

I. THE COURT SHOULD RESOLVE WHETHER §3 MANDATES A STAY OF NONARBITRABLE CLAIMS BETWEEN ARBITRATING PARTIES.

Contrary to respondents' mischaracterization of the §3 question as one involving "parties who never agreed to arbitrate," Br. Opp'n 8, it is undisputed that every MCC and physician in this litigation has an agreement to arbitrate with one or more counterparties in this lawsuit. The question is whether, when a suit contains both arbitrable and nonarbitrable claims *between parties to an arbitration agreement*, §3 requires the district court to stay litigation of claims that involve issues referable to arbitration.

The courts of appeals disagree about the applicability of §3's mandatory stay under these circumstances, and neither *Moses H. Cone* nor *Byrd* resolves the issue. Courts that deem §3 inapplicable have, however, invoked references to "piecemeal litigation" in *Moses H. Cone* and *Byrd* as a justification for holding that an arbitrating party's request for a §3 stay lies within the discretion of the district court. But when an artfully pleaded "nonarbitrable" claim rests on an arbitrable dispute, a court's refusal to stay the litigation will result in judicial resolution of issues referable to arbitration, contravening the FAA. The ongoing confusion about the proper scope of §3 undermines the arbitration rights the FAA was created to protect and warrants the Court's attention.

A. The Court Should Clarify Whether *Moses H. Cone* and *Byrd* Authorize District Courts to Deny an Arbitrating Party's Request for a §3 Stay.

Like respondents, the First, Second, Fourth, and Eleventh Circuits have seized on references to "piecemeal litigation" in

Moses H. Cone and *Byrd* to justify a discretionary interpretation of §3. *See, e.g.*, App. 47a; *Am. Recovery Corp.* v. *Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 97 (CA4 1996); *McCarthy* v. *Azure*, 22 F.3d 351, 361 & n.15 (CA1 1994); *Genesco, Inc.* v. *T. Kakiuchi & Co.*, 815 F.2d 840, 856 (CA2 1987). But nothing in *Moses H. Cone* or *Byrd* supports this result and, to the contrary, both opinions recognize the strong federal policy favoring arbitration and thus support faithful enforcement of §3.

Neither *Moses H. Cone* nor *Byrd* holds that a district court has discretion to deny an arbitrating party's request for a §3 stay of nonarbitrable claims that involve issues referable to arbitration, as respondents erroneously suggest. Br. Opp'n 10-11. In *Moses H. Cone*, the Court concluded that a federal district court abused its discretion in entering an *abstention-based* stay of a §4 action to compel arbitration pending resolution of a state-court suit involving a third party who was not a party to the arbitration agreement at issue in the §4 proceeding. 460 U.S., at 7, 19-20. The Court explained that deference to the state-court litigation was improper because enforcement of the arbitration agreement was paramount, even if the state-court claims against a nonarbitrating party would have to proceed separately. *Id.*, at 20. There was no question whether a §3 stay would reach all claims between the parties to the arbitration agreement.

The Court remarked in a footnote that the federal district court could, as a matter of discretion, stay litigation of claims by or against parties with no obligation to arbitrate pending resolution of the arbitration to promote judicial efficiency. *Id.*, at 20 n.23. But the discretion referenced in that footnote stemmed from a district court's inherent power to manage its docket and conserve judicial resources, not from the *statutory* stay Congress defined in §3. *Id.* (citing *Landis* v. *N. Am. Co.*, 299 U.S. 248, 254-55 (1936)). The distortion of footnote 23 advocated by respondents, and adopted by the First, Second, Fourth, and Eleventh Circuits, conflates the mandatory stay

directive in §3 with courts' inherent, discretionary docket-management authority, nullifying the dual-enforcement regime created by the FAA. *See id.*, at 22 (explaining that Congress created §3 and §4 as parallel devices to enforce arbitration agreements).

A similar distortion has emerged from courts' misinterpretations of *Byrd*, which, contrary to respondents' assertion, did not "ma[k]e it clear that related arbitrable and nonarbitrable claims should both proceed" when an arbitrating party invokes §3. Br. Opp'n 11. No §3 stay of litigation was at issue in *Byrd*. Rather, the Court determined that a *stay of arbitration* of supplemental state-law claims was not necessary to vindicate the "federal interest" in related federal-court litigation. *Byrd*, 470 U.S., at 222. Nor did judicial-efficiency concerns outweigh enforcement of the parties' arbitration agreement, even if parallel proceedings resulted. *Id.*, at 217-21.

Byrd did not prescribe dual proceedings whenever litigation involves both arbitrable and nonarbitrable claims. The Court merely acknowledged that dual proceedings must be tolerated *if* necessary to give effect to the parties' arbitration agreement. *Id.*, at 219-21. Yet courts have seized on *Byrd* and *Moses H. Cone* to transform §3 stay requests into matters within a district court's discretion, viewing simultaneous, dual proceedings as the norm notwithstanding an arbitrating party's invocation of §3. *See, e.g.*, App. 47a; *Am. Recovery Corp.*, 96 F.3d, at 97.

Confusion over *Byrd* and *Moses H. Cone* persists and, with the Eleventh Circuit's decision in this case, is growing. Because severe repercussions result when courts like the Eleventh Circuit invoke *Moses H. Cone* and *Byrd* to justify judicial resolution of arbitrable disputes, the Court should grant the petition and clarify whether these decisions authorize district courts to deny §3 stays and require litigation of arbitrable issues over an arbitrating party's objection.

B. The Courts of Appeals Are Divided Over the Scope of §3's Mandatory Stay.

Respondents attempt to create the illusion of circuit uniformity by citing inapposite cases in which either the party requesting a §3 stay is not a signatory to any arbitration agreement or the nonarbitrable claims involve topics distinct from arbitrable disputes. *See DSMC, Inc.* v. *Convera Corp.*, 349 F.3d 679, 685 (CADC 2003) (holding §3 inapplicable to party who was not a signatory to an arbitration agreement); *AgGrow Oils, L.L.C.* v. *Nat'l Union Fire Ins. Co.*, 242 F.3d 777, 782 (CA8 2001) (same); *IDS Life Ins. Co.* v. *SunAmerica, Inc.*, 103 F.3d 524, 529 (CA7 1996) (same); *United Communications Hub, Inc.* v. *Qwest Communications, Inc.*, No. 01-56742, 2002 WL 1963592, at *3 (CA9 Sept. 24, 2002) (unpublished) (denying stay when nonarbitrable claims between arbitrating parties involved disputes on a distinct topic); *cf. ATSA of Cal., Inc.* v. *Cont'l Ins. Co.*, 702 F.2d 172, 176 (CA9 1983) (evaluating whether district court abused its discretion in staying claims involving nonparty to an arbitration agreement who could not be compelled to arbitrate), *amended on other grounds by* 754 F.2d 1394 (CA9 1985). Respondents' only other authority is a Sixth Circuit opinion that perfunctorily alludes to discretion in passing but does not involve a stay issue and neither applies nor interprets §3. *See Glazer* v. *Lehman Bros.*, 394 F.3d 444, 452 (CA6 2005) (quoting the steps for arbitrability analysis recited in *Stout* v. *J.D. Byrider*, 228 F.3d 709 (CA6 2000), which also did not analyze §3), *petition for cert. filed*, 73 U.S.L.W. 1419 (U.S. Apr. 11, 2005) (No. 04-1375). Not one of respondents' citations is relevant to the question presented, which asks whether §3 requires a court to grant an arbitrating party's stay request when litigation of nonarbitrable claims would judicially resolve issues referable to arbitration. Pet. i.

Respondents erroneously suggest that the Seventh Circuit is aligned with the Eleventh Circuit by citing *IDS*, 103 F.3d,

at 529-31 (a nonsignatory case), and *Pryner* v. *Tractor Supply Co.*, 109 F.3d 354 (CA7 1997), which notes *other* courts' discretionary treatment of requests to stay litigation of nonarbitrable claims pending resolution of arbitrable disputes. Pet. 14-15 (discussing *Pryner*, 109 F.3d, at 361). *Pryner* did not reach the issue, however, because the Seventh Circuit determined that the plaintiffs could not be deemed parties to an arbitration agreement with their employer that was contained solely in a collective bargaining agreement. 109 F.3d, at 363-65. And, as the Seventh Circuit already had held in *IDS*, a §3 stay is available only when both the party seeking a stay *and* the party opposing a stay are parties to an arbitration agreement. *IDS*, 103 F.3d, at 529.

Far from demonstrating uniformity, both *Pryner* and *IDS* confirm the existence of confusion and disagreement among the courts of appeals when an arbitrating party invokes §3. *Pryner* recognized that the First, Second, and Fourth Circuits' discretionary reading of §3 contradicts the plain language of the statute, 109 F.3d, at 361, which, as *IDS* makes clear, requires a court to stay litigation upon an arbitrating party's request "*even if only one* of the issues in the litigation is subject to an agreement to arbitrate." 103 F.3d, at 529 (emphasis added). This view is shared by the Third Circuit, which also interprets §3 to require courts to grant stays requested by arbitrating parties once the court identifies an arbitrable claim. *Lloyd* v. *Hovensa, LLC*, 369 F.3d 263, 269-70 (CA3 2004) (concluding that "Congress intended to deprive the District Court of discretion to deny a stay").[2]

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[2] As noted in the petition, the Third Circuit's interpretation of §3 arose in an appeal involving the propriety of a dismissal, as opposed to a stay, pending arbitration. Pet. 14. Respondents improperly disparage *Lloyd* on this basis, Br. Opp'n 12 n.8, but they do not and cannot dispute that the Third Circuit's mandatory interpretation of §3 conflicts with the First, Second, Fourth, and Eleventh Circuits' discretionary application of the statute.

Respondents concede that the Fifth Circuit also has repeatedly construed §3 to mandate a stay of litigation that involves issues subject to arbitration, Br. Opp'n 14-15; *see* Pet. 17-18, but respondents erroneously attempt to marginalize that court's position as an intracircuit conflict. Again, respondents cite cases involving parties who are not signatories to an arbitration agreement. Br. Opp'n 14-15 & n.11. In that context, the Fifth Circuit has indicated that a stay regarding nonparties lies within the inherent discretion identified by this Court in footnote 23 of *Moses H. Cone*. *See Adams* v. *Ga. Gulf Corp.*, 237 F.3d 538, 540 (CA5 2001) (citing 460 U.S., at 20 n.23). The Fifth Circuit has never, however, questioned the mandatory nature of §3 as to arbitrating parties. Thus, the alleged intracircuit debate does not implicate the relevant issue: whether a court must grant an *arbitrating* party's request to stay litigation that involves issues referable to arbitration.

The disagreement between the Third, Fifth, and Seventh Circuits' mandatory construction of §3 and the First, Second, Fourth, and Eleventh Circuits' erroneous discretionary reading of the statute breeds confusion and produces inconsistent enforcement of arbitration agreements. That misinterpretation, if not corrected, will cause the unprecedented destruction of millions of arbitration agreements in this case. The Court should grant the petition to resolve the conflict over the proper scope of §3.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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